No. 305 307

IN THE

Supreme Court of the United States

October Term 1943

HOME ICE COMPANY OF MEMPHIS,
Petitioner,

vs.

BREWER R. CHAPMAN, ET ALS,
Respondents.

From the Circuit Court of Appeals, Sixth Circuit

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Home Ice Company of Memphis, a Tennessee corporation, would respectfully show as follows:

This is an application for certiorari from a judgment of the United States Circuit Court of Appeals for the Sixth Circuit, which reversed a judgment at law from the District Court of the United States for the Western District of Tennessee, Western Division.

There is filed herewith a certified transcript of the record in the case, including the proceedings in the Circuit

Court of Appeals of the Sixth Circuit, to which this writ is asked to be directed. There is also filed herewith as appendices marked "Appendix A" and "Appendix B" to this petition, ten certified copies of the two briefs of the petitioner, then appellee in the Court of Appeals, to show that good and substantial defenses were made and pressed upon the attention of that Court which would have prevented the reversal sought to be reviewed but which were not in anywise passed on by the Court of Appeals.

The judgment of the District Court was reversed in the Court of Appeals on June 1, 1943, and this petition is filed within ninety days thereof.

SUMMARY STATEMENT

The judgment reversed by the Court of Appeals was a dismissal by the District Court of the suit of respondent Chapman and four other employees of petitioner, Home Ice Company, as plaintiffs and intervenors, claiming additional wages and overtime from petitioner's alleged failure to comply with Sections 6 and 7 of the Fair Labor Standards Act of June 25, 1938. (29 U.S.C.A., Sections 201, et seq.

The case was tried on its merits although the District Court's opinion was based on the single ground that plaintiffs and intervenors were neither engaged in nor in the production of goods for interstate commerce. The other defenses were made and disposed of by proof.

The plaintiffs and intervenors claimed to be working in interstate commerce by either:

Driving the ice trucks, handling the ice, or loading it in the bunkers of the cars while completing its delivery to cars, or

Aiding in making the ice destined for or ultimately delivered for interstate passenger consumption or car refrigeration of goods to be shipped in interstate commerce.

The Ice Company defended on the ground that the sale, delivery and manufacture of the ice, in which the plaintiffs participated, were wholly local and that such as was delivered for passenger consumption or car refrigeration was merely a small, occasional and incidental part of petitioner's business initiated, consummated and paid for wholly within the state. The trial court, after hearing the whole case, sustained this defense, but found the facts on the entire case. (Op. R. pp. 46-57; Findings of Fact, R. pp. 57-61; Judgment, R. p. 61).

The Ice Company defended also on the grounds, sustained by the proof and findings, that the plaintiffs and intervenors each and all failed to show that any of them loaded or delivered any substantial amount of ice for passenger consumption or car refrigeration at all, and that each and all of them failed to show that any of them worked in producing ice that was either intended for or that went into passenger consumption or car refrigeration at all, that the burden was upon plaintiffs and intervenors to show that they produced or worked upon ice that went into such passenger consumption or car refrigeration, and this they wholly failed to do.

These last defenses, although urged upon it, were not passed upon by the Court of Appeals, which reversed

the decision below as to all of the plaintiffs, without specification or discrimination between those who loaded ice into passenger or refrigerator cars and those who produced ice that went to such uses, and those who did neither of such things. In fact, the Court of Appeals did not pass upon these defenses at all, although they were shown without contradiction. (Judgment Court of Appeals, R. p. 77; Opinion Court of Appeals, R. pp. 77-72).

The work of plaintiffs and intervenors which touched ice for passenger consumption or car refrigeration was:

John Scribner, intervenor, delivering ice to refrigerator cars,
1-1/4 hours,
underpaid 5c an hour, 6-1/4c
(Ans. R. p. 37; Findings of Fact, R. p. 58).

Will Brown,
3 hours hauling ice, underpaid 10c an hour, (Answer R. p. 39) 30c

Joe Johnson, loading ice,
1-1/4 hours,
underpaid 5c an hour, 6-1/4c
2 hours,
underpaid 10c an hour, 20c

26-1/4c

Total 62-1/2c
(Ans. R. p. 30; Findings of Fact, R. p. 58).

Other than these underpayments, which only were underpayments if they were substantially in interstate commerce, none of the plaintiffs nor intervenors had anything to do with delivering, handling or producing

ice that went into passenger consumption or car refrigeration. Most of the plaintiffs worked in ice plants where none of the ice produced was either intended for or ever went to passenger consumption or car refrigeration. Some worked at plants from which ice occasionally was sold for passenger car consumption or refrigerator car use, but there was no proof or attempt to prove that any plaintiff or intervenor worked at such ice plant at any time when such ice was worked on or produced.

The whole proof was, with the exception just mentioned, that the plaintiffs and intervenors aided in producing the ice at ice factories, some of which occasionally sold 6.80% of the total output for passenger consumption and car refrigeration, without pointing out any relation between the time such ice so destined was produced and the time when plaintiffs and intervenors worked in such ice plants.

The Court of Appeals held that the plaintiffs and intervenors worked in ice factories some small part of whose products was ultimately sold for interstate passenger consumption and car refrigeration of interstate freight. Therefore, it held that the lower court was wrong in its opinion upon that point, and so it remanded the case for a new trial, although the case had already been fully tried. The defenses that the lower court's decision was right upon the further and other grounds that no plaintiff nor intervenor assisted in producing ice that went to passenger consumption or car refrigeration, and that the proof wholly failed to show the connection of any plaintiff or intervenor with ice intended for use for passenger consumption or car refrigeration were urged

upon the Court of Appeals as complete bars to a reversal of the case, not only in oral argument, but by written brief. (Brief, Appendix "A" to Petition for Certiorari; Reply Brief, Appendix "B" to Petition for Certiorari.)

The Court of Appeals ignored these defenses and bars to reversal, and did not pass upon them at all. Instead it reversed all of the cases without reference to their individual merits and remanded all of them for a new trial. (Opinion Court of Appeals, R. pp. 77-82; Judgment Court of Appeals, R. p. 77).

STATEMENT AS TO BASIS OF JURISDICTION.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code of the United States, as amended, and also shown in Title 28, U.S.C.A., Section 347, being also the Act of February 13, 1925, c. 229, Sec. 1.

Copy of the Opinion of the United States Circuit Court of Appeals for the Sixth Circuit, sought to be reviewed, is presented herewith in the printed transcript of record filed.

QUESTIONS PRESENTED.

The questions presented in this case are:

1. Whether an employee of a company manufacturing and selling ice is engaged in interstate commerce in completing the local sale of ice by his employer by delivering it into the bunkers of passenger or refrigerator cars which themselves will take passengers and perishable goods into interstate commerce.

2. Whether an underpayment of 6-1/4c to one, 26-1/4c to another and 30c to a third employee pre-

sents such a substantial violation of law in interstate commerce or such a justiciable controversy as to require the maintenance of a suit in interstate commerce.

3. Whether occasional sales, amounting to 6.80% of an ice factory's output, for passenger consumption and car refrigeration amount to the production of such ice for interstate commerce because it is used as a utility for interstate transportation.

4. Whether ice sold and delivered to carriers for passenger consumption and car refrigeration has been delivered into the actual physical possession of the ultimate consumer of such ice within the meaning of Section 3(i) of the Fair Labor Standards Act of June 25, 1938, so as to exclude such ice therefrom as goods for interstate commerce.

Put in another way, the question is whether goods "for interstate commerce" applies to goods entering into interstate commerce after their delivery into the hands of the ultimate consumer of such goods.

5. Finally and ultimately the question is whether the denial by this court of certiorari in *Hamlet Ice Co. vs. Fleming*, to the Court of Appeals for the Fourth Circuit on October 12, 1942, means that the sporadic and occasional sale of ice manufactured for local consumption to carriers using it in interstate transportation brings its products within sections 6 and 7 of the Fair Labor Standards Act.

Assuming all of these questions decided adversely to petitioner, the questions further presented are:

(a) Whether the burden was upon the plaintiffs and intervenors to show that the ice in which production they aided was intended for or ultimately went for passenger consumption or car refrigeration.

(b) Whether the burden was further upon plaintiffs and intervenors to show some unit of time, that

is, during what time or during what weeks, or to what extent they were engaged in aiding in the production of ice which was intended for or ultimately went for passenger consumption or car refrigeration, so as to furnish some basis, part of a week, or otherwise, upon which the time when they were engaged in such production could be measured in order to compute their wages.

(c) Whether it is error for the Court of Appeals to reverse the case upon a question of law, which question of law was not determinative of the suit, the controversy or the decision in that court, but to ignore determinative questions and to leave them without disposition while at the same time reversing the case.

These questions are determinative of the merits of these combined lawsuits.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. These questions with reference to the sale and delivery of ice in the given locality for use in transportation by passenger consumption and car refrigeration are arising all over the United States. Nominally, there is no conflict in the decisions of the Circuit Courts of Appeal, but in reality there is, because they either do not give the same reasons, or use words as reasons that are not reasoning at all. There is, however, a conflict between the various Courts of Appeal and the District Courts. Judge Russell of Georgia has modified and receded from the very position taken by him in the decision which was, and whose reasoning was, affirmed in *Atlantic Ice Company vs. Walling*, 131 Fed. (2d) 518, and so has added to the uncertainty. Judge Russell's opinion is styled

Fleming vs. Atlantic Ice Co., 40 Fed. Sup. 654, but his later decision in *Gaston vs. Dalton Ice Company* (not reported, 6 Labor Cases, 61,491), rendered after his affirmance, modifies and explains the former decision to an extent which would exclude the case at bar from control under the Act.

The Supreme Court of Arkansas, in *Couch vs. Ward*, 168 S. W. (2d) 822, also differs from the Courts of Appeals and differentiates the Hamlet Ice Company case as not applying to a situation similar to that of the case at bar. So, there is confusion and lack of understanding among the various courts as to the application of this Act to ice cases like those in the instant case.

2. This is an important question of Federal Law and it has not been settled by this Court, but it should be settled because the best courts do not understand the law in the same way. There are dissenting opinions in the Courts of Appeals, notably Judge Sibley in the Atlantic Ice case. Notwithstanding the claimed rule that denial of certiorari shall not be taken as an affirmance of the grounds of decision of the lower court, the refusal of certiorari in the Hamlet case undoubtedly leads the various circuits to follow the Fourth Circuit in that case.

It seems certain that this Court could not and did not follow the reasoning of the Fourth Circuit and this case is differentiated from the Hamlet case in that the physical setup in the Hamlet case was built for car refrigeration and 75% of its business was to aid in interstate transportation. This Court doubtless considered that the real use and purpose of the Hamlet factory was to make ice to refrigerate interstate cars. Nevertheless,

various lower courts are very prone to follow the intimation from refusal to review the Hamlet decision.

3. The Court of Appeals below has decided a federal question in a way probably in conflict with the applicable decisions of this Court in remanding this case for a new trial in view of the fact that the plaintiffs and intervenors had sustained no burden of proof to show that any of them was engaged in producing ice intended for or that went into passenger consumption or car refrigeration. The District Court found:

> "The plants where each of the plaintiffs worked, and whether or not they at any time herein involved manufactured ice which ultimately went into sale for car refrigeration, are definitely shown by the proof. The proof, however, is wholly silent as to whether at or about the time of any plaintiff's employment the plant where he worked was engaged in the production of ice, any of which was intended to be sold or which was ultimately sold for any car refrigeration."
>
> Findings of Fact, R. pp. 59-60.

This Court has decided that the burden was on the employees "to prove that in the course of performing their services for petitioner and without regard to the nature of its business, they were, as its employees, engaged in the production of goods within the meaning of the Act and that such production was for interstate commerce."

Warren-Bradshaw Drilling Company vs. Hall, 317 U. S. 88.

With the proof silent, as found by the District Court, and the burden on the plaintiffs and intervenors, as was decided by this Court, the decision of the Court of Ap-

peals in reversing the District Court was in conflict with the applicable decision of this Court.

4. The Court of Appeals so far departed from the accepted and usual course of judicial procedure as to call for an exercise of this Court's power of supervision in deciding a federal question in conflict with the applicable decisions of this Court in reversing and remanding this cause for a new trial in spite of the fact that the decision in the District Court was correct even though the District Court gave a wrong reason for it, and in ignoring the defenses that the plaintiffs and intervenors had not worked on ice intended for, or produced for, car refrigeration at all, and in reversing the case in spite of such defenses.

J. E. Riley Investment Co. vs. Commissioner of Internal Revenue, 311 U. S. 55;
Helvering vs. Gowran, 302 U. S. 238.

This petitioner has no right of appeal or for writ of error herein to this Court, and it attaches hereto a brief showing more fully its views.

Wherefore, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Sixth Judicial Circuit, commanding that Court to certify and send to this Court for review and determination on a day certain to be therein designated a full and complete transcript of the record and proceedings in the case entitled "Brewer R. Chapman, et als., Appellants, vs. Home Ice Company of Memphis, et als., Appellees" which was numbered 9266 on the docket of that Court, to the end that said cause may be reviewed and determined by this

Court as provided in Section 240 of the Judicial Code (U.S.C.A.) Title 28, Section 347, and that the judgment of the Circuit Court of Appeals for the Sixth Circuit be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Court may seem just and appropriate.

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